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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BARRY TUBB, an individual,

Plaintiff,

vs.

PARAMOUNT PICTURES
CORPORATION, a Delaware
corporation,

Defendant.

Case No. **2:24-cv-01417-GW-BFMx**

**REPLY IN SUPPORT OF MOTION
TO DISMISS PLAINTIFF'S
COMPLAINT
[Fed. R. Civ. Proc. 12(b)(6)]**

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Defendant Paramount Pictures Corporation ("Paramount") respectfully submits this Reply in support of its Motion To Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("MTD").¹

¹ Plaintiff's Opp. incorporates his separate response to Paramount's SLAPP Motion (C.C.P. § 425.16); similarly, this Reply incorporates the SLAPP Reply.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Plaintiff ignores nearly all of the controlling authorities discussed in Paramount’s Motion, and mischaracterizes the few decisions he does mention. These cases make clear that Plaintiff’s Lanham Act claim is barred by well-established First Amendment protections, which he cannot evade by making arguments that the Ninth Circuit already rejected. Plaintiff’s meritless right-of-publicity and derivative state law claims also are barred by controlling law. Because Plaintiff cannot overcome the dispositive defenses raised in the Motion, his entire Complaint should be dismissed with prejudice.²

II. PLAINTIFF’S CLAIMS FAIL AS A MATTER OF LAW.

A. Plaintiff’s Lanham Act Claim Fails.

1. The First Amendment Bars Plaintiff’s Lanham Act Claim.

There is no dispute that Plaintiff’s Lanham Act claim arises entirely from the content of Paramount’s Film “Top Gun: Maverick” (“Maverick” or “Film”) – specifically, the depiction of Plaintiff as “Wolfman” in a group photograph shown for several seconds in what he describes as a “key scene” in the Film. See MTD 6; MTD Opp. 2-3. The constitutionally-based Rogers³ test squarely applies to cases like this one: it recognizes that Lanham Act claims based on expressive works “implicate the First Amendment right of free speech, which must be balanced

² Claims purporting to arise from expressive works, like Plaintiff’s claims here, should be resolved at the earliest possible stage. MTD 5, 22; see also Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1082-83 (9th Cir. 1976) (recognizing threat to First Amendment rights from the “mere pendency” of a lawsuit); Dorsey v. National Enquirer, 973 F.2d 1431, 1435 (9th Cir. 1992) (“speedy resolution” at the “earliest stage” of a case is essential for cases involving First Amendment rights); Winter v. DC Comics, 30 Cal.4th 881, 891 (2003) (same for right-of-publicity cases targeting expressive works).

³ Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).

1 against the public interest in avoiding consumer confusion” and that “consumers are
 2 less likely” to mistake a depiction in an expressive work as “a sign of association,
 3 authorship, or endorsement.” Twentieth Century Fox v. Empire Distrib., 875 F.3d
 4 1192, 1198 (9th Cir. 2017) (“Empire”).

5 Plaintiff’s attempt to evade application of the Rogers test is baseless. His
 6 argument that it applies only to titles has been squarely rejected by the Ninth
 7 Circuit. MTD Opp. 6, 9. As the court explained in E.S.S. Entertainment 2000 v.
 8 Rock Star Videos, 547 F.3d 1095 (9th Cir. 2008), “there is no principled reason
 9 why it ought not also apply” to a use “in the body of the work.” Id. at 1099.
 10 Accord Brown v. Electronic Arts, 724 F.3d 1235, 1241 (9th Cir. 2013) (“[w]e have
 11 consistently employed the Rogers test in § 43(a) cases involving expressive works
 12 ... including where the trademark or other identifying material in question was used
 13 in the body of a work rather than in the title”; dismissing Lanham Act claim
 14 involving use of celebrity’s persona in videogame). See also Dickinson v. Ryan
 15 Seacrest Enterprises, 2019 WL3035090, at *9 (C.D. Cal. Mar. 26, 2019) (Rogers
 16 barred claims based on non-consensual appearance of celebrity in television show);
 17 MTD 5-7.

18 Plaintiff next tries to cast doubt on the applicability of the Rogers test by
 19 citing a state court decision, involving only state law claims. MTD Opp. 7 (citing
 20 No Doubt v. Activision, 192 Cal.App.4th 1018 (2011)); see id. at 2025. That
 21 court’s decision not to apply the Rogers test to a state law claim is irrelevant; the
 22 court even acknowledged that under controlling Ninth Circuit law, the Rogers test
 23 applies to Lanham Act claims involving expressive works. Id. at 1025, 1038.

24 Plaintiff’s citation to Winchester Mystery House v. Global Asylum, 210
 25 Cal.App.4th 579 (2012), is also off-point. There, a state appeals court rejected the
 26 plaintiffs’ argument that application of the Rogers test in a trademark case should
 27 be limited to “iconic” trademarks, holding that even if the Circuit had adopted such
 28

1 a limitation (which it has not),⁴ it was not binding; it then applied the Rogers test to
 2 the plaintiffs’ Lanham Act claims arising from the use of their trademarks in a film.
 3 210 Cal.App.4th at 589-90. In this Circuit, Rogers applies to Lanham Act claims
 4 involving expressive works, like Plaintiff’s Second Cause of Action here. Under
 5 that test, Plaintiff’s claim plainly fails.

6 First, given Plaintiff’s own allegation that he appears in a “pivotal” scene of
 7 Maverick, and that the use of his “likeness in the scene is essential,” he cannot
 8 credibly dispute that the artistic relevance prong of Rogers is met here. Cmpl’t. ¶¶ 2,
 9 38; MTD 5-6. Nonetheless, he remarkably “question[s]” whether the Photograph
 10 has “artistic relevance,” arguing the Film “is ‘about’ Maverick and Rooster, it is not
 11 specifically ‘about’ Barry Tubb or his character, Wolfman...” MTD Opp. 8. But
 12 the Ninth Circuit rejected this same argument in E.S.S., finding artistic relevance in
 13 a videogame’s depiction of the plaintiff’s strip club, even though the game was not
 14 “about” the club. 547 F.3d at 1100. Emphasizing the “low threshold” for finding
 15 artistic relevance, the court held it was sufficient that the use of the mark helped to
 16 establish the “look and feel” of the city where the game takes place. Id. Accord
 17 MGFB Properties v. Viacom, 54 F.4th 670, 681 (11th Cir. 2022) (“artistic relevance
 18 does not turn on whether the work is about the trademark or its holder”).⁵ The use
 19 of the Photograph depicting the Top Gun “Class of 1986” (including Plaintiff as
 20

21 _____
 22 ⁴ E.g., Empire, 875 F.3d at 1197 (iconicity is a consideration, not a
 23 requirement, under the first prong of Rogers analysis); E.S.S., 547 F.3d at 1100
 24 (lack of “cultural significance” of plaintiff’s mark had no bearing on its relevance to
 defendant’s work).

25 ⁵ Plaintiff’s citation to Parks v. LaFace Records, 329 F.3d 437 (6th Cir.
 26 2003), is misplaced; it involved the use of Rosa Parks’ name as the title of a song
 27 the defendant admitted had “absolutely nothing to do with” her. Id. at 452.
 28 Subsequent cases distinguished Parks from cases like this one, emphasizing that the
 song’s “irrelevant title” with “no artistic relevance to the work” posed a unique risk
 of misleading “the consuming public.” Empire, 875 F.3d at 1199.

1 Wolfman), is artistically relevant to the Film, as Plaintiff's own allegations make
2 clear.

3 Second, Plaintiff does not even address the second prong of Rogers,
4 effectively conceding that nothing in the Film was "explicitly misleading" to
5 consumers. MTD 6-7; MTD Opp. 6-9. This constitutes "a waiver or abandonment
6 of those issues warranting dismissal" of his Lanham Act claim. Shorter v. Los
7 Angeles Unified Sch. Dist., 2013 WL6331204, at *5 (C.D. Cal. Dec. 4, 2013); see
8 also Walsh v. Nevada Dep't of Human Resources, 471 F.3d 1033, 1037 (9th Cir.
9 2006) (plaintiff "effectively abandoned" claim, and forfeited right to raise it on
10 appeal, where opposition "failed to address" arguments in the defendant's motion to
11 dismiss). See also MTD 6-7.⁶

12 Finally, Plaintiff makes the convoluted assertion that Paramount "admits"
13 there is no First Amendment protection here because it also claims its use was
14 permitted under the parties' Agreement. MTD Opp. 9.⁷ This is nonsensical. The
15 Film's use of the Photograph is constitutionally protected; the fact that Paramount
16 also had the right to use Plaintiff's image in connection with the Wolfman character
17 provides an additional reason why his claims fail. E.g., MTD 8-12, 16-17; see also
18 Daniel v. Wayans, 8 Cal.App.5th 367, 393-394 (2017) (dismissing misappropriation
19 claims on First Amendment grounds and because contract permitted use). Accord
20 Polydoros v. Twentieth Century Fox, 67 Cal.App.4th 318, 326 (1997) ("industry
21

22
23 ⁶ Plaintiff's separate discussion of the standard likelihood-of-confusion
24 factors is irrelevant to the second prong of Rogers, which "ask[s] not only about the
25 likelihood of consumer confusion but also whether there was an explicit indication,
overt claim, or explicit misstatement that caused such consumer confusion."
Empire, 875 F.3d at 1199 (quotation omitted).

26 ⁷ Plaintiff cites Duncan v. Cohen, 2008 WL2891065 (N.D. Cal. July 22,
27 2008), but it is off-point; it did not involve Lanham Act claims or the Rogers test,
28 but only whether state law claims arising from the solicitation of funds to make a
film were subject to the SLAPP statute. Id. at *1-2; MTD Opp. 9.

1 custom” of obtaining releases does not diminish First Amendment protections
 2 where consent is not required); de Havilland v. FX Networks, 21 Cal.App.5th 845,
 3 861 (2018) (noting producers “may enter into agreements with individuals
 4 portrayed in those works for a variety of reasons,” but “the First Amendment simply
 5 does not require” them). Under controlling First Amendment law, Plaintiff’s
 6 Lanham Act claim fails.

7 **2. Plaintiff Cannot Demonstrate A Plausible Likelihood Of**
 8 **Confusion.**

9 Plaintiff’s claim independently fails because it is clear from the Film itself
 10 that there is no plausible likelihood of consumer confusion. MTD 7-8. Paramount
 11 cited numerous cases in which courts evaluating Lanham Act claims arising from
 12 the content of expressive works reached that conclusion as a matter of law; where
 13 the allegations do not involve the marketing of competing goods, the traditional
 14 likelihood-of-confusion analysis is unnecessary. Id. Plaintiff simply ignores this
 15 entire argument and the supporting authorities. MTD Opp. 9-13.

16 Instead, Plaintiff offers a superficial treatment of the factors from AMF Inc.
 17 v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979), underscoring what a poor fit they
 18 are for this case.⁸ Sleekcraft involved competing manufacturers using similar
 19 trademarks to advertise related products; in that context, the Ninth Circuit identified
 20 factors to consider in evaluating “whether confusion between related goods is
 21 likely.” Id. at 346, 348. But courts routinely have declined to apply Sleekcraft to
 22 Lanham Act claims arising from artistic works, finding that looking at the work
 23 itself demonstrated the absence of any plausible likelihood of confusion. E.g.,

24
 25
 26 ⁸ In Mattel, Inc. v. MCA Recs., Inc., the Ninth Circuit made this observation
 27 directly, noting the “traditional test” articulated in Sleekcraft “fails to account for
 28 the full weight of the public’s interest in free expression” when the alleged use is
 for an expressive purpose, rather than as a source-identifier. 296 F.3d 894, 900 (9th
 Cir. 2002).

1 Burnett v. Twentieth Century Fox, 491 F.Supp.2d 962, 973 (C.D. Cal. 2007)
 2 (granting motion to dismiss Lanham Act claim arising from depiction of plaintiff in
 3 animated TV show without considering Sleekcraft factors); Stewart Surfboards v.
 4 Disney Book Group, 2011 WL12877019, at *6-8 (C.D. Cal. May 11, 2011) (same;
 5 rejecting Lanham Act claims based on a book cover depicting plaintiff's trademark
 6 on a surfboard); MTD 6-7.

7 Likewise, Plaintiff's Lanham Act claim fails because no reasonable viewer
 8 watching the Film would be confused. The most any reasonable viewer would
 9 glean from Plaintiff's inclusion in the Photograph shown in the Film is that he
 10 portrayed Wolfman in the Original Film, which is entirely accurate. Plaintiff offers
 11 no response to this point, which independently justifies dismissal of his Lanham Act
 12 claim. MTD 7-8.⁹

13 **B. Plaintiff's Misappropriation Claims Fail As A Matter Of Law.**

14 **1. The First Amendment Bars Plaintiff's Claims.**

15 The MTD detailed consistent case law across the country holding that right-
 16

17
 18 ⁹ None of the cases that Plaintiff cites in his discussion of the Sleekcraft
 19 factors involved remotely similar Lanham Act claims, or the content of expressive
 20 works. The only cases involving the use of a "celebrity's persona" are inapposite
 21 (MTD Opp. 10-11): Allen v. National Video, 610 F.Supp. 612, 617 (S.D.N.Y.
 22 1985) (celebrity impersonator's appearance in an advertisement); White v. Samsung
 23 Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992), as amended (Aug. 19, 1992)
 24 (use of celebrity's likeness in advertisement); Academy of Motion Picture Arts and
 25 Sciences v. Creative House Promotions, 944 F.2d 1446, 1449 (9th Cir. 1991)
 26 ("marketing" of product resembling an Oscar statue). His other cases are even
 27 further afield. MTD Opp. 9-11. See Toho Co. v. Sears, Roebuck & Co., 645 F.2d
 28 788, 790 (9th Cir. 1981) (dispute over use of Godzilla mark on garbage bags); New
W. Corp. v. NYM Co. of California, 595 F.2d 1194, 1196 (9th Cir. 1979) (dispute
 over use of confusingly similar magazine titles); HMH Pub. Co. v. Brincat, 504
 F.2d 713, 715 (9th Cir. 1974) (dispute over use of Playboy-related marks for
 automotive businesses). And Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.,
 40 F.3d 247, 249 (7th Cir. 1994), as amended on denial of reh'g (Jan. 11, 1995) did
 not even involve a Lanham Act claim.

1 of-publicity claims based on the content of expressive works are constitutionally
 2 barred. MTD 8-10. See also Hollywood Unlocked, Inc. v. Lifetime Entm't Servs.,
 3 LLC, 2021 WL3265037, at *3 (C.D. Cal. Mar. 17, 2021) (“First Amendment
 4 precludes right-of-publicity claims concerning ‘expressive works, whether factual
 5 or fictional’”) (quoting Daly v. Viacom, Inc., 238 F.Supp.2d 1118, 1123 (N.D. Cal.
 6 2002)); de Havilland, 21 Cal.App.5th at 858 (“[c]ourts long ago recognized that a
 7 celebrity’s right of publicity does not preclude” use in expressive work) (citation
 8 omitted). Plaintiff simply ignores this part of the MTD, and does not even mention
 9 most of the cited cases.

10 Instead, in his SLAPP Opp., Plaintiff tries to rely on Zacchini v. Scripps–
 11 Howard Broadcasting Co., 433 U.S. 562 (1977), which is inapposite. Zacchini, a
 12 “human cannonball” performer, sued a television station that broadcast his “entire
 13 act,” which he claimed made the public “less willing to pay to see” it live. 433 U.S.
 14 at 563-64, 575, 578. In allowing his case to proceed, the Supreme Court majority
 15 repeatedly emphasized that the station showed Zacchini’s “entire performance,”
 16 which went “to the heart of [his] ability to earn a living as an entertainer” given the
 17 unique nature of his work. Id. at 576 (emphasis added). It expressly noted that if
 18 the station had “merely reported” about Zacchini’s act, “with or without showing
 19 his picture ... we would have a very different case.” Id. at 570 (emphasis added).¹⁰
 20 See also Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal.4th 387, 401 (2001)
 21 (noting Zacchini “was not an ordinary” right-of-publicity case because the
 22 defendant “appropriated the plaintiff’s entire act, a species of common law
 23 copyright violation”); ETW Corp. v. Jireh Publ’g, 332 F.3d 915, 956-957 (6th Cir.
 24 2003) (rejecting Tiger Woods’ misappropriation claims arising from the
 25

26 ¹⁰ The majority did not apply constitutional strict scrutiny, which subsequent
 27 decisions have held is required for any claims arising from the content of expressive
 28 works. E.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (content-based
 speech regulation is subject to the highest level of scrutiny).

1 unauthorized use of his likeness in a painting on constitutional grounds;
 2 distinguishing Zacchini); Cardtoons v. MLBPA, 95 F.3d 959, 962 (10th Cir. 1996)
 3 (finding claims based on use of athletes' images in expressive works were
 4 constitutionally barred; distinguishing Zacchini).

5 Here, Plaintiff's image as Wolfman appears in the Film for a few seconds, in
 6 a group Photograph. This is not remotely similar to Zacchini, where the broadcast
 7 decimated the market for the plaintiff's extremely unique kind of performance. See
 8 Guglielmi v. Spelling-Goldberg Prods., 25 Cal.3d 860, 875 (1979) (Bird, C.J.,
 9 concurring) ("in balancing the interests at stake, the Supreme Court observed that
 10 respondents had not merely made some use of Zacchini's name and likeness, but
 11 had usurped Zacchini's entire act").¹¹

12 Plaintiff also cannot evade Sarver v. Chartier. The Ninth Circuit applied
 13 constitutional strict scrutiny, relying on post-Zacchini authority, in finding that
 14 right-of-publicity claims involving expressive works are presumptively
 15 unconstitutional. 813 F.3d 891 at 905-906 (9th Cir. 2016). In this context, and in
 16 distinguishing Zacchini, the Court referenced Sarver's status as a private figure (and
 17 the absence of any impact on his ability to earn a living) in finding there was no
 18 "compelling interest" sufficient to overcome this presumptive unconstitutionality.
 19 Plaintiff ignores this rationale, inaccurately concluding that Sarver's private-figure
 20 status means that every misappropriation claim involving a celebrity must be
 21 immune from a First Amendment challenge. E.g., SLAPP Opp. 20. That grossly
 22 misreads Sarver, which squarely held that films like "The Hurt Locker" are not
 23 "commercial" speech, and made clear that without the kind of compelling interest
 24 identified in Zacchini, right-of-publicity claims based on expressive works are
 25 constitutionally barred. Id. at 905-906. It also ignores the facts here, which do not

27 ¹¹ The other cases Plaintiff cited in his SLAPP Opp. are easily distinguishable
 28 cases involving advertisements and products. SLAPP Opp. 19; see SLAPP Reply at
 n.12.

1 involve the use of Plaintiff’s “entire act,” product merchandizing, or advertising,
 2 which the Sarver panel distinguished. 913 F.3d at 905-06. And it ignores the
 3 panel’s question whether California’s right-of-publicity law applies to expressive
 4 works at all, given the California Supreme Court’s holding in Guglielmi that the
 5 First Amendment barred heirs of famed actor Rudolph Valentino from pursuing a
 6 right-of-publicity claim based on a fictional film about him. Id. at 906 n.9 (citing
 7 Guglielmi, 25 Cal.3d at 869).

8 Subsequently, in de Havilland, the California Court of Appeal unequivocally
 9 rejected the notion that Sarver’s rationale only applies to private figures: it held that
 10 the First Amendment barred famed actress Olivia de Havilland’s right-of-publicity
 11 claims based on the depiction of her in a TV show, even though she is a “living
 12 legend” of Hollywood’s Golden Age and “an internationally-known celebrity.” 21
 13 Cal. App. 5th at 869. Instead, the court held that the program was “as
 14 constitutionally protected as was the film in Sarver.” Id. at 860.

15 As discussed above, Plaintiff’s image appears in the Film for approximately
 16 four seconds, in a group photograph providing a visual reference to the Original
 17 Film. The Film is plainly not a “commercial transaction,” nor was this use a
 18 wholesale usurpation of “an entire performance,” akin to the highly unusual
 19 circumstances and narrow holding in Zacchini. Under controlling authority,
 20 Plaintiff’s misappropriation claims are constitutionally barred.¹²

21 **2. The Transformative Use Defense Bars These Claims.**

22 California’s transformative use doctrine is an independent basis for striking
 23 Plaintiff’s right-of-publicity claims. See MTD 10-12; de Havilland, 21 Cal.App.5th
 24

25 ¹² Plaintiff’s prior contractual relationship with Paramount does not change
 26 this constitutional protection. Vijay v. Twentieth Century Fox Film Corp., 2014
 27 WL 5460585, at *5 (C.D. Cal. Oct. 27, 2014) (“no law indicates that ... [a
 28 contractual] agreement would render inapplicable a constitutional defense to a tort
 cause of action”).

1 at 862-63. His cursory treatment of this defense incorrectly assumes that the
 2 defense only applies if the use involves an altered likeness. SLAPP Opp. 21-22;
 3 MTD Opp. 19 (“[t]his is not an avatar, cartoon depiction, robot, or video game
 4 character”). But “that is not the test.” Woloszynska v. Netflix, Inc., 2023
 5 WL7166828, at *7 (N.D. Cal. Oct. 30, 2023) (plaintiffs “improperly focus[ed] on
 6 whether the Photograph [with their image] itself was transformed”). Instead, the
 7 question is “whether the celebrity likeness is one of the ‘raw materials’ from which
 8 an original work is synthesized, or whether the depiction ... of the celebrity is the
 9 very sum and substance of the work in question.” Id. at *6 (quoting Comedy III, 25
 10 Cal.4th at 406).¹³

11 Plaintiff also misunderstands the test as applied in Comedy III. There, the
 12 Court held that the defendant’s work was not sufficiently transformative because it
 13 consisted entirely of “lithographs and T-shirts bearing a likeness of The Three
 14 Stooges,” so their images were literally “the very sum and substance of the work.”
 15 25 Cal.4th at 393, 406. But that does not mean that only distorted or altered
 16 “likenesses” can be protected as a transformative use. To the contrary, in de
 17 Havilland, this defense protected the defendants’ depiction of a famous actress in
 18 their docudrama, even though they “wanted to make the appearance of [de
 19 Havilland] as real as possible.” 21 Cal.App.5th at 863. The appellate court found
 20 that de Havilland’s likeness was merely one element among many in a program
 21 whose “marketability and economic value does not derive primarily from [de
 22

23 ¹³ Nevertheless, the depiction of Plaintiff in the Photograph is as Wolfman – a
 24 fictional character – not as Barry Tubb; the items Plaintiff identifies as being in the
 25 Photograph (the “cowboy hat and flight suit” he wore in Top Gun (MTD Opp. 19)),
 26 and his inclusion in the fictional 1986 Top Gun class, are aspects of Wolfman’s
 27 persona – not Plaintiff’s. That alone is “transformative.” MTD 12; Landham v.
 28 Lewis Galoob Toys, 227 F.3d 619, 626 (6th Cir. 2000) (rejecting misappropriation
 claim where actor failed to show defendant’s toy invoked “his own persona, as
 distinct from that of the fictional character” he portrayed). Plaintiff has no response
 to this dispositive point.

Havilland’s] fame but rather comes principally from ... the creativity, skill, and reputation of [the show’s] creators and actors.” Id. at 864.

The same is true here. Plaintiff only appears on-screen in the Film as part of a group photo for roughly four seconds of a Film lasting more than two hours.¹⁴ The Film indisputably derives its marketability primarily from megastar Tom Cruise, and the contributions of many on-screen performers and off-screen creators. See MTD 11. As in de Havilland, the transformative use doctrine applies here because Plaintiff’s image is merely one of the “raw materials” from which Maverick “is synthesized.” Id. at 864 (quoting Comedy III, 25 Cal.4th at 406).

Courts have applied this defense even where the plaintiffs had a contractual relationship with the defendant. See, e.g., Vijay, 2014 WL5460585, *1 (C.D. Cal. Oct. 27, 2014). There, the court dismissed with prejudice an actor’s right-of-publicity claims arising from his work on the film “Titanic”; applying the transformative use test, the court held that the plaintiff’s “appearance is but a minuscule portion of [Titanic], heavily edited and synthesized with significant artistic expression.” Id. at *4. The court rejected the argument that the plaintiff’s “employment agreement ... trumps the First Amendment defense,” holding that in adjudicating a right-of-publicity claim based on the use of his likeness in the film, all that mattered was that the use was transformative. Id. at *5. See also Woloszynska, 2023 WL7166828, at *1, 7 (rejecting plaintiffs’ misappropriation claim arising from use of their image in a photograph in a fictional television show; although there was a dispute about whether a written release barred the claim, court nonetheless found use was transformative, reasoning that “the Photograph is a small part of a complex and elaborate television production, and the scenes in the Show are transformed by music, dialogue, and film editing in the final product”); Daniel,

¹⁴ The de Havilland court noted that the actress depicting the plaintiff appeared in “about 4.2 percent” of the program – far more than Plaintiff’s image appears in the Film. Id. at 863, 865.

8 Cal. App. 5th at 396-97 (striking right-of-publicity claims by actor in fictional film based on filmmaker’s online posts related to the movie; the defendant’s use of “two unaltered images” was transformative by virtue of “the combination of the juxtaposed images with his commentary”).

Just as in the cited cases, Plaintiff’s exceedingly brief appearance in the Film is merely one of the raw materials from which it is synthesized. His right-of-publicity claims are barred by the transformative use defense as a matter of law.¹⁵

3. Plaintiff’s Claims Are Preempted By The Copyright Act.

The Ninth Circuit consistently has held that right-of-publicity purporting to arise from the expressive use of a likeness that is captured in a copyrightable work are preempted by the Copyright Act. See MTD 12-16 (citing, inter alia, Maloney v. T3Media, 853 F.3d 1004 (9th Cir. 2017); Jules Jordan Video v. 144942 Canada, 617 F.3d 1146 (9th Cir. 2010); Laws v. Sony Music Entm’t, 448 F.3d 1134 (9th Cir. 2006)). Plaintiff not only fails to even mention – let alone distinguish – these controlling authorities, he proffers the same arguments these decisions rejected.

His response to this dispositive defense boils down to his insistence that misappropriation claims “differ from copyright claims in that they deal with the use of Plaintiff’s persona independent of the copyright.” MTD Opp. 21. But the Ninth Circuit has rejected this same argument. Maloney, 853 F.3d at 1011. The court distinguished situations where the plaintiff’s likeness was used “non-consensually on merchandise or in advertising,” but found that if the plaintiff’s likeness is fixed “in a copyrighted artistic visual work” that the defendant used in an expressive work like a film, “a publicity-right claim is little more than a thinly disguised copyright claim because it seeks to hold a copyright holder liable for exercising his

¹⁵ Courts routinely apply transformative use in granting early dispositive motions. E.g., de Havilland, 21 Cal.App.5th at 862 (SLAPP motion); Daniel, 8 Cal. App. 5th at 397 (same); Woloszynska, 2023 WL7166828, at *7 (same); Vijay, 2014 WL5460585 at *5 (motion to dismiss).

1 exclusive rights under the Copyright Act.” Id. at 1016. In that situation – precisely
 2 the circumstance here – the claim is preempted. Id. Accord Laws, 448 F.3d at 1141
 3 (“it is clear that federal copyright law preempts a claim alleging misappropriation of
 4 one’s voice when the entirety of the allegedly misappropriated vocal performance is
 5 contained within a copyrighted medium”); Jules Jordan, 617 F.3d at 1154
 6 (argument that misappropriation claim based on use of actor’s performance as
 7 captured in films was not preempted because it sought to protect his “persona,” was
 8 “reject[ed] ... for the same reason we rejected it in Laws”).

9 Plaintiff does not try to distinguish these cases because he cannot. Instead, he
 10 simply cites inapposite cases in which the defendants used the plaintiffs’ names and
 11 likenesses to sell commercial products and services. E.g., Downing v. Abercrombie
 12 & Fitch, 265 F.3d 994, 1000 (9th Cir. 2001) (retailer used plaintiffs’ names and
 13 likenesses to advertise clothing); Timed Out, LLC v. Youabian, 229 Cal.App.4th
 14 1001, 1004 (2014) (use of models’ photographs to market cosmetic surgery
 15 business);¹⁶ Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) (plaintiff’s
 16 voice imitated in car commercial); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1097
 17 (9th Cir. 1992) (same; snack food commercial).¹⁷ These decisions are entirely

18 _____
 19 ¹⁶ The court emphasized that it was “Defendants’ use of the Models’
 20 likenesses pictured in the photographs to promote Defendants’ business that
 21 constitute[d] the alleged misappropriation,” 229 Cal.App.4th at 1013 (emphasis
 added).

22 ¹⁷ Plaintiff relies heavily on Brown v. Ames, 201 F.3d 654 (5th Cir. 2000),
 23 devoting much his brief to lengthy quotations from the Fifth Circuit’s decision.
 24 MTD Opp. 23-24. The Ninth Circuit distinguished Brown on the ground that it
 25 involved the use of the plaintiffs’ likenesses in “merchandise,” such as posters,
 26 catalogs, and tape and CD covers – not a use in an expressive work. Maloney, 853
 27 F.3d at 1012 n.6; Laws, 448 F.3d at 1141. Plaintiff’s other cited case, KNB
 28 Enterprises v. Matthews, 78 Cal.App.4th 362 (2000), supports Paramount. Id. at
 374 (“a section 3344 claim is preempted ... where an actor ... with no copyright
 interest in the work seeks to prevent the exclusive copyright holder from displaying
 the copyrighted work.”) Here, Plaintiff has no copyright interest in the Photograph;
 he alleges it was taken by Herb Ritts, who had a work-for-hire agreement with

1 irrelevant here, as explained in the MTD and in the line of governing cases Plaintiff
 2 ignores. MTD 14-16. The Ninth Circuit also has noted that Midler and Waits
 3 involved imitations of the plaintiffs’ voices, rather than copyrighted recordings of
 4 the actual voices. Laws, 448 F.3d at 1140-41 (noting “federal copyright law
 5 preempts a claim ... when the entirety of the allegedly misappropriated vocal
 6 performance is contained within a copyrighted medium”). Here, as in Laws (and
 7 unlike Midler and Waits), the entire “likeness” that Paramount allegedly
 8 misappropriated comes from a copyrighted medium – the Photograph.¹⁸

9 Finally, Plaintiff’s hyperbolic assertion that finding preemption here would
 10 make it “acceptable ... to steal the image and likeness of a person” if someone else
 11

12 Paramount. SLAPP Mot. 13 n.13. (The Ninth Circuit does not require the
 13 defendant to be the copyright holder for preemption to apply. See Jules Jordan, 617
 14 F.3d at 1154-55.)

15 Plaintiff’s selective quotations from the Nimmer treatise overlook that it
 16 “draw[s] a line between entertainment works used for their own sake and
 17 commercial works used for advertising purposes” 1 Nimmer on Copyright §
 18 1.17 (2024); see also Maloney, 853 F.3d at 1018 (Nimmer would “limit[] liability to
 19 misappropriation for the purposes of trade[, ...] which do not ordinarily include the
 20 use of a person’s identity in ... entertainment, works of fiction or nonfiction, or in
 21 advertising that is incidental to such uses”) (citing Nimmer § 1.17) (internal
 22 quotations and citation omitted). E.g., McCarthy, Rights of Publicity and Privacy §
 23 11:52 (2d ed.) (“the situation changes when a performer who authorizes a recording
 of his or her performance of an expressive work ... later objects to the reproduction
 or performance of that recording in an expressive, non-advertising use. In those
 cases, a claim of infringement of the right of publicity should be preempted by
 copyright law.”).

24 ¹⁸ The other copyright preemption cases that Plaintiff cites have no bearing
 here because they do not involve right-of-publicity claims. MTD Opp. 21-23
 25 (citing Ryan v. Editions Ltd. W., Inc., 786 F.3d 754, 760 (9th Cir. 2015)
 (contractual attorney’s fees provision not preempted); Montz v. Pilgrim Films &
 26 Television, Inc., 649 F.3d 975, 981 (9th Cir. 2011) (breach of implied contract
 claim); Opperman v. Path, Inc., 205 F.Supp.3d 1064, 1081 (N.D. Cal. 2016)
 27 (intrusion-upon-seclusion claim); Garrido v. Burger King Corp. 558 So.2d 79, 81
 28 (Fla. Dist. Ct. App. 1990) (claims for conversion and misappropriation of “ideas”)).

has a purported copyright claim (MTD Opp. 24) has been rejected by the Ninth Circuit. The court explained in Maloney that its “holding strikes the right balance by permitting” plaintiffs “to control the use of their names or likenesses on merchandise or in advertising, while permitting ... the media” and others to use artistic works bearing their likenesses “for expressive purposes.” 853 F.3d at 1019. In contrast, the Court found that “Plaintiffs’ position, ... would give the subject of every photograph a de facto veto over the artist’s rights under the Copyright Act, and destroy the exclusivity of rights that Congress sought to protect by enacting the Copyright Act.” Id. Under controlling law, Plaintiff’s misappropriation claims are preempted. See MTD 16.¹⁹

4. Plaintiff’s Contract Permitted The Use.

Plaintiff’s misappropriation claims also fail because the parties’ Agreement gave Paramount the right to use Plaintiff’s likeness in connection with the Wolfman character. MTD 16-18.

Plaintiff acknowledges, as he must, that the Agreement clearly and unambiguously states that Paramount “will be the sole and exclusive owner of all rights in the role or character portrayed by [Plaintiff], including name, likeness and distinctive characterizations thereof,” and has “the right to merchandise and exploit such role or character, and the right to use [Plaintiff’s] name and likeness in connection therewith” Pl. Ex. A at 7 ¶ A (emphasis added); MTD Opp. 28.

¹⁹ See also Cusano v. Klein, 473 Fed. App’x 803, 804 (9th Cir. 2012) (suit by KISS band-member concerning reproduction of still and video footage of his performances and appearances was preempted); Milo & Gabby, LLC v. Amazon.com, 12 F.Supp.3d 1341, 1350 (W.D. Wash. 2014) (plaintiffs’ right of publicity claims arising from distribution of photographs were preempted); Lewis v. Activision Blizzard, Inc., 2012 WL5199505, *4 (N.D. Cal. Oct. 22, 2012) (plaintiff’s right of publicity and unjust enrichment claims preempted where they arose from use of her voice recordings in a sound recording); Wells v. Chattanooga Bakery, Inc., 448 S.W.3d 381, 390 (Tenn. Ct. App. 2014) (right of publicity claim based on use of plaintiff’s photograph was preempted).

1 Plaintiff does not dispute that this provision – which gives Paramount the right to
 2 use Plaintiff’s likeness in connection with the Wolfman character – does not include
 3 language limiting this right to the Original Film. Id.; MTD 17.

4 Instead, Plaintiff tries to misdirect by incorrectly asserting that “Paramount
 5 fails to note” another provision in the Agreement about uses of Plaintiff’s “name,
 6 photograph, likeness, ... in connection with advertising, publicizing, and exploiting
 7 the Picture...” MTD Opp. 28. Paramount directly addressed that provision, and
 8 explained why it has no application here: it involves the use of Plaintiff’s own
 9 persona, as made clear by the fact that the full sentence provides for the use of
 10 Plaintiff’s “biography.” SLAPP Mot. 18. Plaintiff disingenuously omits that word
 11 in quoting the Agreement, then says nothing to respond to Paramount’s explanation
 12 about the distinction between a use of Plaintiff’s persona to promote the Original
 13 Film, and the use of his likeness in connection with the Wolfman character. MTD
 14 Opp. 28. Plaintiff does not explain how Paramount’s right to use Plaintiff’s
 15 likeness to exploit the Wolfman character could be limited to the Original Film,
 16 when the Agreement expressly authorized Paramount to exploit the character in,
 17 inter alia, merchandise. MTD 16. His contract claim fails on this additional basis.²⁰

18 **5. Other Defects Independently Bar Plaintiff’s Statutory Claim.**

19 Plaintiff’s statutory claim suffers from two additional legal defects, neither of
 20 which Plaintiff can overcome. MTD 18-20. First, Section 3344 does not apply to
 21 the use of a likeness in an expressive work like a film. Id. (citing de Havilland, 21
 22 Cal.App.5th at 857; Sarver, 813 F.3d at 905, n.9). Plaintiff does not address either
 23 case here, or their recognition that movies are constitutionally-protected expressive
 24

25 ²⁰ Plaintiff emphatically asserts that he only agreed “to render his services as
 26 an actor” in Top Gun (MTD Opp. 27), but Plaintiff did not render any acting
 27 services in connection with the Film. The use at issue was of a group photograph
 28 that included Plaintiff as Wolfman, consistent with the language in the Agreement
 that expressly allows Paramount’s use of Plaintiff’s likeness as that character.
 MTD 16.

works, “not speech proposing a commercial transaction.” Sarver, 813 F.3d at 905; see also MTD Opp. 13-16. His assertion in his MTD Opp. that the Film is merely “a product” because it is “distributed for profit” and “distributed in physical formats” (MTD Opp. 14-15) ignores black-letter law holding that expressive works do not get lesser First Amendment protections if they “are published and sold for profit” Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).²¹

On its face, Section 3344 is limited to the nonconsensual use of a likeness “on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services.” Cal. Civ. Code § 3344(a) (emphasis added). All of the cases Plaintiff cites involved this kind of commercial use. E.g., Midler, 849 F.2d at 462 (car advertisement); White, 971 F.2d at 1396 (electronics advertisement); Comedy III, 25 Cal.4th at 395 (t-shirts and lithographs).²² In de Havilland, the court distinguished those cases from uses arising from the content of expressive works, like the case here. 21 Cal.App.5th at 857-58. Plaintiff’s failure to cite a single case permitting a Section 3344 claim to arise from a film or other expressive work simply underscores that the statute does not reach such conduct.

Second, Plaintiff’s Section 3344 claim fails because his likeness was shown in the Film only as part of a “definable group” depicted in the Photograph. Civ. Code § 3344(b)(2); MTD 19-20. Plaintiff’s only response is the non sequitur that

²¹ See also Aldrin v. Topps Co., Inc., 2011 WL4500013, at *2 (C.D. Cal. Sept. 27, 2011) (“expressive activity does not lose its constitutional protection because it is undertaken for profit”); Hoffman v. Cap. Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001) (article “meant to draw attention to the for-profit magazine in which it appears ... does not fall outside of the protection of the First Amendment because it may help to sell copies”).

²² ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), and Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010), are software cases that did not involve Section 3344 claims; they are irrelevant to Paramount’s Motion.

1 he is “identifiable” (MTD Opp. 16-17), but that ignores the express language of the
 2 statute, which applies the group depiction exemption to individuals who are “readily
 3 identifiable from a photograph” but are “represented in the photograph solely as a
 4 result of being present at the time the photograph was taken and have not been
 5 singled out.” Id. § 3344(b)(1)-(2). It is plain from the Film itself that Plaintiff is
 6 not “singled out” in any way; indeed, in two of the three frames he cites, he is
 7 almost entirely cropped out. See Ex. B at 44:22-44:28; Ex. E. Moreover, Plaintiff
 8 concedes that neither he nor the Wolfman character are mentioned in the scene’s
 9 dialogue (MTD Opp. 17); instead, the Film depicts Hangman looking at the picture
 10 and pointing to Goose, the character portrayed by Anthony Edwards. Ex. B at
 11 44:22-44:28.²³

12 In other words, Plaintiff only appears in the scene because he is part of the
 13 group, and his character was standing next to Cruise’s character “at the time the
 14 photograph was taken.” Civ. Code § 3344(b)(2). This falls squarely within the
 15 definable group exception.

16 **C. Plaintiff’s Derivative Negligence Claim Is Meritless.**

17 Plaintiff effectively concedes that his negligence claim is entirely derivative
 18 of his misappropriation claims, and subject to dismissal on the same grounds. MTD
 19 20. He also fails to rebut Paramount’s showing that this claim independently fails,
 20 because his contract with Paramount for Top Gun did not create any tort duty of
 21 care regarding the use of his image in a different film 30 years later. MTD Opp. 25-
 22
 23
 24

25 ²³ Plaintiff quotes dialogue from the Film referring to the person “next to”
 26 Maverick in the Photograph (MTD Opp. 17), but the character is plainly referring to
 27 Goose, not Wolfman. Ex. B at 44:22-44:28. Plaintiff acknowledges elsewhere in
 28 his Opp. that the entire point of the scene is Hangman’s realization that Goose is
 Rooster’s father. MTD Opp. 2-3.

26.²⁴ To the contrary, the California Supreme Court has held that “conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law.” Erlich v. Menezes, 21 Cal.4th 543, 551 (1999) (emphasis added). See also BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc., 119 Cal.App.4th 848, 853 (2004) (“[a] person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations”). Because Plaintiff does not, and cannot, identify any such duty “independent of the contract,” his negligence claim fails. See also Woloszynska, 2023 WL7166828, at *7-8 (striking negligence claim because plaintiffs failed to show “that Defendants had any duty, legal or otherwise, not to use the Photograph [depicting the plaintiffs] in the Show”); Worldwide Media, Inc. v. Twitter, Inc., 2018 WL5304852, at *10 (N.D. Cal. Oct. 24, 2018) (dismissing plaintiff’s negligence claim as “an impermissible restatement of its breach of contract claims”).

D. Plaintiff’s Contract Claim Fails.

As discussed above, Paramount’s use of Plaintiff’s image in character as Wolfman was authorized under the Agreement. This alone defeats his contract claim. See Section III.A.4, supra; MTD 20.

Additionally, Plaintiff failed to identify any obligation in the Agreement that Paramount purportedly breached. MTD 20-21. Instead, his Opposition underscores that there is nothing in the Agreement that imposed any requirements or limitations on Paramount with respect to any film besides Top Gun. MTD Opp. 27-29. His repeated emphasis that the Agreement only covered his services on the Original

²⁴ The only case Plaintiff cites, Mintz v. Blue Cross, 172 Cal.App.4th 1594 (2009), is inapposite; it involved a health care plan administrator’s duty of care to plan members in making benefits determinations. Id. at 1611.

Film²⁵ proves Paramount's point: for there to have been a breach, the Agreement had to prohibit Paramount from using Plaintiff's likeness in a sequel, but it does not. As in the Complaint, Plaintiff's Opposition simply points to a provision stating that "modifications" must be in writing, but this boilerplate language does not create any additional obligations. MTD 20-21; MTD Opp. 28.²⁶ His breach of contract claim should be dismissed.

E. Plaintiff's Declaratory Relief Claim Fails.

Plaintiff does not dispute that his declaratory relief claim is wholly derivative of his other claims, and subject to the same defenses. MTD 21. He also fails to respond to the point that, to the extent he seeks a declaration about "merchandise" or "advertising," there is no justiciable controversy because he does not allege that Paramount used (or sought to use) his image in that way, nor can he do so. Id.; MTD Opp. 5. He provides no basis for salvaging this meritless claim.

F. Plaintiff Has No "Injunctive Relief" Claim.

Plaintiff's "injunctive relief" claim is not a proper cause of action, and his request to enjoin the distribution of the Film is an unconstitutional prior restraint.

²⁵ Id. 28-29 ("[i]n no place is a sequel contemplated or mentioned"; "[t]here is no mention of any sequel").

²⁶ For the first time in his Opp., Plaintiff vaguely alludes to a provision of the SAG collective bargaining agreement that he claims required separate bargaining "after his agreement for original employment." MTD Opp. 27. But the Complaint does not mention the SAG agreement, or attach it; nor is it pleaded as a basis for any alleged claim. See Cmplt. ¶¶ 113-124. Plaintiff's newly-minted argument should be disregarded. See Schneider v. CDCR, 151 F.3d 1194, 1197 (9th Cir. 1998) ("[i]n determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss") (original emphasis). Plaintiff chose not to assert any claim based on the SAG agreement because it does not support his position; moreover, any purported breach of the SAG agreement may be subject to an arbitration clause, and could only result in narrowly circumscribed remedies. Plaintiff wanted to evade the SAG agreement by bringing meritless tort claims; he cannot invoke it now to try to save those claims.

1 MTD 21. Plaintiff does not address these points at all; he simply repeats boilerplate
 2 language from the Complaint, without citing any authority. MTD Opp. 29-30. This
 3 deficient claim also should be stricken.

4 III. CONCLUSION

5 For all of these reasons, Paramount respectfully requests that this Court
 6 dismiss Plaintiff's Complaint with prejudice. See Brown, 724 F.3d at 1248
 7 (affirming dismissal of Lanham Act claim without leave to amend because no
 8 amendment could overcome constitutional protections); Vijay, 2014 WL 54605854,
 9 at *5 ("[g]iven that Plaintiff's claims for appropriation of likeness and right of
 10 publicity are based on his brief scene in two expressive works, it is unfathomable
 11 that Plaintiff would be able to amend his complaint to allege facts that would cure
 12 these two causes of action of their defects.").

13 DATED: June 10, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for defendant Paramount Pictures Corporation, certifies that this brief contains 6,991 words, which complies with the word limit of L.R. 11-6.1.

DATED: June 10, 2024

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